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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP GEORGE STUART, SR., AND MONS KAPOOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in issuing an administrative summons pursuant to a request for information made by a tax treaty partner, the Commissioner of Internal Revenue is required to state that the foreign tax investigation has not reached a stage analogous to a domestic tax investigation's referral to the Justice Department for criminal prosecution.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 813 F.2d 243. The enforcement orders of the district court (App., *infra*, 25a-26a, 34a-35a) and the opinions of the magistrate (App., *infra*, 27a-33a, 36a-42a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a-23a) was entered on March 24, 1987. A timely petition for rehearing was denied on August 27, 1987 (App., *infra*, 24a). On November 18, 1987, Justice O'Connor extended the time to petition for a writ of certiorari to and including December 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND TREATY INVOLVED

Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405-1406, and Section 7602 of the Internal Revenue Code (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 42a-46a).

STATEMENT

1. Section 7602(a) of the Internal Revenue Code[1] gives the Commissioner the authority to summon papers and witnesses for examination for the purpose of ascertaining tax liabilities. The district courts are empowered to enforce summonses upon a prima facie showing by the Commissioner that the summons was issued in good faith. I.R.C. § 7604; *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964). Section 7602(c) of the Code, added by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 333(a), 96 Stat. 622, provides that a summons may not be issued when there is in effect a referral to the Justice Department for criminal prosecution.[2] Such a referral is defined by the statute as being in effect if (1) the IRS has recommended a grand jury investigation or

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2] This requirement first arose out of this Court's decision in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978). The Court there held (5-4) that the IRS may issue a summons as long as it has not made a Justice Department referral and has "not abandon[ed] in an institutional sense * * * the pursuit of civil tax determination or collection" (*id.* at 318). The dissenting Justices argued for a bright-line test turning entirely upon whether a recommendation for prosecution has already been made to the Justice Department (*id.* at 320-321 (Stewart, J., dissenting)). The TEFRA amendments essentially adopted the dissenting position. TEFRA also added Section 7602(b), which made explicit that a inquiry into the possibility that a criminal offense has been committed is a legitimate purpose for the issuance of a summons.

prosecution to the Justice Department or (2) the Justice Department has requested otherwise confidential return information from the IRS for use in a criminal tax investigation.

The United States has entered into tax treaties with other nations that provide, among other things, for the exchange of information to assist each other in administration of the tax laws. In accordance with these treaties, the IRS may issue a summons to obtain information at the request of a treaty partner. The information exchange agreement between the United States and Canada that is applicable to this case is found in Articles XIX and XXI of the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405, 1406 [hereinafter 1942 Convention]. Article XIX provides that each country undertakes to furnish to the other "information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws" and that may be of use in the assessment of tax liabilities. Article XXI provides that the Canadian Minister may seek the cooperation of the Commissioner of Internal Revenue who "may furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States."[3]

[3] These treaty provisions have been held to contemplate use of domestic summons enforcement procedures by the Commissioner of Internal Revenue to assist a treaty partner in a foreign tax investigation even though no United States taxes are involved. See, *e.g.*, *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976). We note that a new Income Tax Convention between the United States and Canada became effective after the issuance of the summonses involved in this case (see 1 Tax Treaties (CCH) ¶ 1301 (1984)). Article XXVII of the new Convention (¶ 1317k), effective with respect to taxes for taxable years beginning on or after January 1, 1985, contains language relating to exchange of information that is essentially indistinguishable from the language contained in Articles XIX and XXI of the 1942 Convention.

2. Respondents are citizens and residents of Canada who have bank accounts with the Northwest Commercial Bank in Bellingham, Washington. The Canadian Department of National Revenue (Revenue Canada)—the Canadian equivalent to the Internal Revenue Service (IRS)—is attempting to determine respondents' income tax liabilities under Canadian law for tax years 1980, 1981, and 1982. Revenue Canada, acting pursuant to the 1942 Convention, requested in January 1984 that the IRS obtain and provide bank records necessary to the determination of respondents' Canadian tax liabilities for the tax years in question. App., *infra*, 2a.

Thomas J. Clancy, IRS Director of Foreign Operations, was at that time the "competent authority" (see Art. XIX) for the United States with respect to such tax treaty information requests. Director Clancy determined that the Canadian requests for information were within the scope of the treaty and that it was appropriate for the United States to honor the requests. Accordingly, on April 2, 1984, the IRS served administrative summonses for the requested information on the Northwest Commercial Bank. App., *infra*, 2a-3a.

3. Respondents received notice of the summonses and directed the bank not to comply. Pursuant to Section 7609 of the Internal Revenue Code, they then petitioned the district court to quash the summonses, raising three claims: (1) the summonses were not issued for lawful purposes; (2) the summonses did not seek information relevant to any inquiry concerning an internal revenue tax of the United States; and (3) the information sought could be obtained directly by Revenue Canada under Canadian law. The United States filed oppositions to the petitions to quash, together with motions for summary enforcement, and supported those filings with affidavits from Director Clancy. He stated therein that he had decided to honor the Canadian requests and to issue the summonses because:

(1) the requested information may be relevant in determining respondents' tax liability; (2) the same type of information can be obtained by Canadian tax authorities under Canadian law; and (3) the information requested was not already in the possession of the IRS. Director Clancy also declared that Revenue Canada had requested the information to determine the correct tax liabilities of respondents pursuant to a "criminal investigation, preliminary stage" and that he had determined that Revenue Canada's requests were within the scope of the treaty. App., *infra*, 2a-3a.

A magistrate held a consolidated hearing on the petitions to quash and recommended that the district court enforce both of the summonses (App., *infra*, 27a-33a, 36a-42a). Over respondents' objections to the magistrate's recommendations, the district court ordered the bank to comply with the summonses (*id.* at 25a-26a, 34a-35a).

4. The enforcement orders were stayed pending appeal, and the court of appeals reversed by a 2-1 vote (App., *infra*, 1a-21a). The court held that the affidavits submitted did not sufficiently demonstrate that the summonses were issued in "good faith" as required under United States law (see *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); App., *infra*, 8a-14a). Accordingly, the court ruled that the treaty did not require that the summonses be enforced because of a failure to satisfy the condition that the information sought be information that "the Commissioner is entitled to obtain under the revenue laws of the United States of America" (Art. XXI).

Specifically, the court stated that one of the elements of good faith for domestic summonses is the requirement that there has been no referral to the Justice Department for criminal prosecution. See I.R.C. § 7602(c). The court then rejected the government's argument that this requirement did not apply to summonses issued at the request of a

treaty partner, an argument that the court acknowledged had been accepted by the Second Circuit in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47, 49-53 (1983). See App., *infra*, 9a-11a. The Second Circuit had held that, in light of the significant differences between the U.S. and foreign legal systems, the legitimate purpose inquiry for treaty summonses should not necessarily incorporate all of the features of that standard developed for domestic cases. In particular, the Second Circuit explained that the policy considerations that underlie the prohibition against post-referral summonses—namely, concern about infringing on the role of grand juries and about expanding discovery powers in criminal prosecutions—simply have no relevance to a Canadian investigation of a Canadian citizen with respect to his Canadian tax liabilities. 703 F.2d at 52. The court below did not address these points. It simply stated that it "decline[d] * * * to adopt *Manufacturers and Traders Trust Co.*[,]" noting that the statutory codification of the prohibition on post-referral summonses had eliminated the need to delve into the "institutional good faith" of a foreign government (App., *infra*, 11a).[4]

Instead, the court below ruled that the good faith doctrine applies to treaty summonses to the same extent that it applies to domestic summonses. The court then held that "in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral" (App., *infra*, 13a). The court stated that such a rule is preferable to placing the burden of proof on the taxpayer because the IRS is in the best posi-

[4] The summons at issue in *Manufacturers* had been issued prior to the effective date of the TEFRA amendments, and therefore the majority opinion in *LaSalle Nat'l Bank* was still the law.

tion to "consult with Canada's competent authority" and "to have greater familiarity with Canadian administrative procedures" (*ibid.*). The court concluded that "it was clear error to find that the affidavits made a prima facie showing of legitimate purpose" (*id.* at 14a).

Judge Wright dissented (App., *infra*, 17a-21a). He stated that Director Clancy's affidavit had made a prima facie showing of good faith that was not refuted by respondents. The dissent criticized the majority for "creat[ing] an additional requirement for the good faith showing," namely, the requirement that the IRS affirmatively state that the foreign criminal investigation has not reached a stage analogous to a Justice Department referral (*id.* at 18a-20a). The dissent also concluded that the majority did not offer "sound bases" for rejecting *Manufacturers* (*id.* at 19a) and thus that the decision below "creates an unnecessary intercircuit split, imposes new burdens on the competent authority and meddles unnecessarily in Canadian internal affairs" (*id.* at 17a).[5]

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided an important question of law pertaining to our tax treaty obliga-

[5] The dissent also criticized (App., *infra*, 20a-21a) the majority's refusal to consider certain supplemental legal materials submitted by the government. In response to questions raised for the first time at oral argument concerning the burden of proof on the referral issue, the government had submitted supplemental case law showing that the taxpayer bears the burden of proof on this issue. The government also had submitted certain foreign law materials showing that Revenue Canada had not yet made the equivalent of a Justice Department referral in this case. The majority refused to consider these materials because the government had failed to seek leave of the court before filing the domestic law materials (see Fed. R. App. P. 28(c) and (j)) and because the court believed that, in fairness to respondents, the foreign law materials should have been submitted no later than in the appellate brief (App., *infra*, 14a-15a).

tions. The court has concluded that United States cooperation with foreign tax investigations is limited by all restrictions applicable to summonses issued in domestic investigations, and it has applied to tax treaty summonses the standards that are grounded entirely in internal policies that bear no relevance to practices in the treaty partner's jurisdiction. In so doing, the court of appeals has imposed upon government enforcement of IRS summonses a new condition that marks a departure from congressional intent and from well established law.

The error committed by the court of appeals is of great importance because its practical effect would be to impair the reciprocal cooperation of our tax treaty partners and to impede the flow of information under the exchange of information provisions of tax treaties. Moreover, the decision below directly conflicts with the decision of another court of appeals, thus creating the likelihood that indistinguishable foreign requests for tax information will yield different results depending upon the circuit in which they arise, and perhaps giving the impression that the United States judicial system favors one foreign country over another. It is therefore appropriate for this Court to grant certiorari.

1. As the court of appeals candidly acknowledged (App., *infra*, 11a), it "decline[d] * * * to adopt" the Second Circuit's decision in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F.2d 47 (1983), and its refusal to do so has created a square conflict in the circuits. That case, like this one, involved summonses issued by the IRS pursuant to an information request by Revenue Canada under Articles XIX and XXI of the 1942 Convention. In *Manufacturers*, the taxpayers under investigation by Revenue Canada were also under criminal investigation by the Royal Canadian Mounted Police, and the two agencies of the Canadian government freely exchanged information, as permitted by Canadian law. The district court refused to enforce the IRS summonses, concluding that they were issued in bad faith because the Canadian tax officials who had initiated the treaty request intended to share the information received with the Royal Mounted Police.

The Second Circuit reversed and ordered the summonses enforced. The court observed that the summonses probably could not be enforced if the matter had been purely domestic because of the policy against utilization of an IRS summons to acquire evidence for a pending criminal prosecution (703 F.2d at 49-50). The court concluded, however, that, for "international purposes, the requirements for summons-enforcement are not in all respects precisely the same as for domestic cases and that here the Government has satisfied all the standards applicable under the Convention" (*id.* at 50). The court explained that the "dominant condition" for a request under the treaty is that Revenue Canada be considering the determination of a person's income tax liability under Canadian law, and that condition was clearly satisfied (*ibid.*).

The court specifically discussed whether the fact that the information would be used partially for Canadian criminal investigatory purposes posed a bar to enforcement of the summons. The court noted that Canadian law imposed no restriction on such use, and it held that the United States prohibition on such use in domestic cases does not apply in the treaty context. 703 F.2d at 50-51. The court explained that the restriction on issuance of domestic summonses following a referral for criminal prosecution "stems from special provisions of United States law"—namely those that center criminal prosecutions in the Department of Justice, rather than the IRS, and those that make the grand jury the focus of prosecution discovery (*id.* at 52). "This policy is wholly internal * * * [and] is not applicable to Canada which does not

have our marked separations and does not normally use the grand jury" (*ibid.*). The court continued (*ibid.*): "The United States has no interest in thrusting its policy (in this regard) into Canadian prosecutions, Canada has no interest in having that policy applied to its taxpayers, and * * * a Canadian taxpayer * * * has no right to expect that he will have the protection accorded by this country to its own taxpayers and potential defendants." The court added that "Canada might consider it a failure on this country's part to comply with the treaty's commitment if enforcement of the summonses were refused on grounds Canada does not recognize in its own territory or with respect to its own income taxes" (*id.* at 52-53).

The decision below, which held that the criminal referral restriction in Section 7602(c) of the Code fully applies to IRS summonses issued pursuant to treaty requests, squarely conflicts with *Manufacturers*. The affidavits submitted by Director Clancy here manifestly would have satisfied the standards for treaty summonses set forth in *Manufacturers*, but the court here held that it was "clear error to find that the affidavits made a prima facie showing of legitimate purpose" (App., *infra*, 14a). To the extent the decision below may be read to suggest that *Manufacturers* might be decided differently today in light of TEFRA (see *id.* at 11a), that suggestion is wholly without merit. TEFRA explicitly reaffirmed that the purposes for which a summons may be used "include the purpose of inquiring into any offense" in connection with the tax laws (26 U.S.C. 7602(b)), while adopting the "bright line" standard of the dissent in *United States* v. *LaSalle Nat'l Bank*, 437 U.S. 298 (1978)—*i.e.*, the standard that a summons may not be issued after *the IRS* has made a criminal referral *to the U.S. Department of Justice*, but that there is not to be an additional open-ended inquiry into the "institutional good faith" of the IRS (see note 2, *supra*). Accordingly, the TEFRA amendments in no way

would have affected the analysis in *Manufacturers*, which focused entirely upon the criminal referral restriction.[6] Indeed, in enacting TEFRA Congress specifically identified the concerns underlying the referral restriction as the same ones discussed by the Second Circuit in *Manufacturers*—noting that it did not intend "to broaden the Justice Department's right of criminal discovery or to infringe on the role of the grand jury as a principal tool of criminal prosecution" (1 S. Rep. 97-494, 97th Cong., 2d Sess. 286 (1982)).[7] Hence, there can be no doubt that the *Manufacturers* decision remains fully viable today in the wake of TEFRA, and thus, as Judge Wright correctly stated, the decision below "creates an intercircuit conflict" (App., *infra*, 19a).

2. The decision of the court of appeals in this case is erroneous in several respects. It misinterprets the standards governing the enforcement of treaty summonses by mistakenly importing domestic policy concerns into an international context in which they should play no role. More generally, the court's opinion fails to follow recognized principles of treaty interpretation in construing the language of the Convention. Finally, the unprecedented requirement imposed by the court that the IRS affirmatively show that the treaty partner's criminal investigation has not reached a stage analogous to a

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[6] The court of appeals' suggestion that the Second Circuit's decision in *Manufacturers* was premised on its "reluctan[ce] to delve into the institutional good faith of Revenue Canada" (App., *infra*, 11a) is entirely without foundation. There is no hint in the Second Circuit's opinion of any consideration of a possible "institutional good faith" inquiry; rather, the opinion focuses exclusively on the appropriateness of importing the criminal referral restriction into the treaty summons context—a restriction that is common to both the majority and dissenting opinions in *LaSalle Nat'l Bank* and to the TEFRA amendments.

[7] Congress took this language directly from this Court's opinion in *LaSalle Nat'l Bank* (see 437 U.S. at 312), which was the focus of the analysis in *Manufacturers*.

Justice Department referral is at odds with well-settled principles governing the burden of proof in summons enforcement proceedings.

a. An administrative summons issued by the IRS will not be enforced unless it is issued in "good faith." The basic requirements for establishing good faith were set forth by this Court in *United States* v. *Powell*, 379 U.S. 48 (1964). The IRS "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already in the Commissioner's possession, and that the administrative steps required by the Code have been followed" (*id.* at 57-58).

In *United States* v. *LaSalle Nat'l Bank, supra*, the Court considered whether there was an additional requirement that would limit the use of administrative summonses as a criminal investigative tool The Court concluded that Section 7602, as in effect at that time, did not authorize the use of a summons for the sole purpose of advancing a criminal investigation (see 437 U.S. at 316 n.18). The Court held that "the primary limitation on the use of a summons occurs upon the recommendation of criminal prosecution to the Department of Justice" (*id.* at 311); it also held that a summons cannot issue if the IRS as an institution has abandoned the pursuit of civil tax determination or collection (*id.* at 318). This latter restriction was eliminated by Congress in TEFRA in 1982 when it authorized in Section 7602(b) the use of a summons for investigating tax offenses, while it codified in Section 7602(c) the prohibition on issuance of a summons after a Justice Department referral.

The Court in *LaSalle Nat'l Bank* explained that the rationale for the criminal referral restriction derived from the division of authority in our system for the conduct of criminal investigations and prosecutions. Specifically, the Court found that Congress did not intend that the sum-

mons power be used "to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation" (437 U.S at 312; see also *id.* at 313 n.15). The Court pointed to the fact that a referral to the Justice Department is necessary to allow a criminal prosecution to proceed and that such a referral deprives the IRS of its ability to compromise both the criminal and civil aspects of a fraud case. At that point, the Court concluded, the degree of necessary information exchange between the two agencies would be such that IRS use of information to determine civil liability "would inevitably result in criminal discovery" (*id.* at 312). Moreover, in enacting TEFRA, Congress adverted to these same concerns identified by the Court in *LaSalle*—resisting the expansion of criminal discovery by the Justice Department and intrusion into the role of the grand jury (1 S. Rep. 97-494, *supra*, at 286).

These domestic policy considerations plainly are of no relevance to the enforcement of treaty summonses. When a summons issued at the request of a treaty partner is enforced, there can be no encroachment upon the function of the institution of the grand jury in this country nor is there an expansion of the Justice Department's discovery power. In accordance with our treaty obligations, the information is simply provided to a foreign government, which uses it for its own domestic purposes in accordance with its own laws. In the case of Canada, for example, the institution of the grand jury has been abolished (except in limited circumstances in Nova Scotia), and all crimes are charged by information. See 2 Can. Rev. Stat. ch. 34, § 507 (1970). And the Canadian system permits information sharing between agencies in criminal investigations; Section 241(4) of the Canadian Income Tax Act, 5 Can. Tax Rep. (CCH) ¶ 27,742 (1987), provides that, for any purpose related to the revenue, the Minister may disclose

to any authorized person of the Canadian Government any materials obtained by him in the course of his investigation. See also *Manufacturers*, 703 F.2d at 51.

Thus, the rule adopted by the court below advances no discernible policy interest, either of the United States or of Canada. Canadian taxpayers who use banks in this country have no right to expect that the restrictions afforded against criminal discovery by this country for purposes of its own law enforcement activities will apply to them in connection with a Canadian investigation of their Canadian tax liabilities. As the Second Circuit said in *Manufacturers*, "[t]he United States has no interest in thrusting its policy (in this regard) into Canadian prosecutions, [and] Canada has no interest in having that policy applied to its taxpayers" (703 F.2d at 52). On the other hand, while the decision below advances no legitimate policy interest, it does have the deleterious effect of inhibiting the exchange of tax information provided for in the Income Tax Convention with Canada. In sum, the decision below is erroneous because it requires a treaty partner's tax investigation to meet standards grounded in domestic policies that have no application in the treaty partner's jurisdiction, and because it unnecessarily hinders investigations that the United States has pledged by treaty to assist and that are entirely proper under the laws of the treaty partner.[8]

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[8] Moreover, the rule adopted by the court of appeals injects a new and complex issue into summons proceedings—the comparison of the various stages of a foreign tax investigation with our own very different system. It was precisely the desire to prevent this type of amorphous inquiry that prompted Congress in TEFRA to adopt the bright-line test of the *LaSalle Nat'l Bank* dissent and eliminate the inquiry into "institutional good faith." Thus, the decision below runs counter to Congress's expressed desire to eliminate "protracted litigation" and "to simplify administration of the [tax] laws" (1 S. Rep. 97-494, *supra*, at 285-286).

b. The decision below also contravenes established principles of treaty interpretation. The holding of the court of appeals seems to rest implicitly upon the conclusion that the treaty phrase "such information * * * as the Commissioner is entitled to obtain under the revenue laws of the United States" (Art. XXI) does not cover situations where the foreign country's criminal investigation has reached a stage analogous to a Justice Department referral (see App., *infra*, 7a, 11a). It has long been settled, however, that the construction placed upon a treaty by the Executive Branch is entitled to great deference by the courts. See, *e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180-185 (1982); *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933). It is likewise well established that treaties are to be construed liberally to effectuate the treaty partners' intentions. See, *e.g.*, *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. at 185; *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150, 161, 163 (1940). And domestic law should be interpreted, if possible, to avoid restricting the scope of a preexisting treaty provision. See *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902); I.R.C. § 7852(d). The court of appeals' interpretation does not adhere to these principles. The court paid no deference to the Executive Branch's contrary interpretation, and the court read the treaty and Section 7602 narrowly to defeat the treaty's overrriding purposes.

The manifest purpose of the treaty provision involved here is to provide for the exchange of information between nations in order to assist the treaty partner's tax investigations. This cooperation is designed to serve the more general goal of "prevent[ing] fiscal evasion." *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9, 13 (2d Cir. 1975), cert. denied, 426 U.S. 934 (1976). The summons at issue here undeniably was issued in furtherance of those goals at Canada's request. The court of appeals' action in this case

and its more general imposition of a new "foreign equivalent of referral" restriction on the use of treaty summonses can only serve to retard the accomplishment of these goals. This restriction is not compelled by the treaty language itself, and the court of appeals certainly cannot be regarded as having read that language liberally to advance the treaty's goals. As the Second Circuit suggested in *Manufacturers* (703 F.2d at 51), the treaty provision (Art. XXI) gives the partner the right to obtain "information the Commissioner is entitled to obtain under the revenue laws of the United States"; the fact that the IRS is "entitled to obtain" bank records for use in tax investigations is sufficient to justify enforcement of a treaty request like the one in this case. Indeed, even a narrow, literal reading of the treaty and the statute does not support the court of appeals' holding. Section 7602(c) prohibits the issuance of a summons only when there has been a referral to the U.S. Justice Department, which indisputably has not occurred here; the statute gives no hint that an inquiry should be made into whether a foreign investigation has reached a point analogous to a referral.

In sum, the court of appeals' holding casts a shadow over the Income Tax Convention with Canada and other similar treaties. It undermines the information exchange purpose of the treaty provision and may well impede the flow of reciprocal tax information and assistance necessary to our own internal tax investigations. More generally, the decision may weaken the position of the United States in dealing with its treaty partners and otherwise harm our international relations. As the Second Circuit noted in *Manufacturers* (703 F.2d at 53), "our international relations with Canada might be damaged and the executives in both countries might be embarrassed if an organ in this country were to characterize a Canadian request as made in 'bad faith' where the request was perfectly appropriate under the law of the requesting country."

The court of appeals seriously erred in interpreting the treaty and Section 7602 to yield these undesirable consequences in the absence of any relevant policy or other justification for its interpretation.

c. Apart from its erroneous holding that the equivalent of a Justice Department referral in the foreign tax investigation prevents a treaty summons from being enforced, the court of appeals also erred in placing upon the government the burden of showing the absence of such a referral equivalent. The court of appeals held that "the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral" (App., *infra*, 13a). This unprecedented conclusion appears to be based on the court's assumption that the IRS would be required in a domestic summons case to establish, as part of its prima facie case for enforcement, that a Justice Department referral is not in effect (see *ibid.*). This premise is erroneous.

To obtain enforcement of a domestic summons, the government bears the burden of showing that the requirements of *United States* v. *Powell*, *supra*, are met—essentially that the summons authority is being invoked in good faith for purposes authorized by the Code. This is ordinarily accomplished by means of an affidavit of the agent issuing the summons. See, *e.g.*, *United States* v. *Balanced Financial Mgmt., Inc.*, 769 F.2d 1440, 1443 (10th Cir. 1985). It has never been held, however, that the government must, in addition, show the absence of a criminal referral as part of its prima facie case.

In *LaSalle Nat'l Bank*, the Court affirmed the validity of a dual purpose summons—one seeking evidence for both criminal and civil investigation—but it held that a summons would not be enforceable if the IRS had abandoned its purpose of civil tax determination. The Court explicitly stated, however, that the person opposing enforcement bore the "heavy" burden "to disprove the actual existence of a valid civil tax determination or collection

purpose" (437 U.S. at 316). The lower courts accordingly recognized that the government established its prima facie case by the submission of an affidavit stating that the *Powell* factors were satisfied, and it was left to the person opposing enforcement to disprove the existence of a valid civil tax purpose at the "rebuttal stage" of the enforcement proceedings. See, *e.g.*, *United states* v. *Kis*, 658 F.2d 526, 530, 538-543 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State Nat'l Bank*, 607 F.2d 61, 68 (3d Cir. 1979) (footnote omitted) ("once the Government has carried its *Powell* burden of proof of 'good faith,' the burden shifts to the taxpayer to show that the institutional 'good faith' required by *LaSalle* does not exist").

The enactment of TEFRA did nothing to change this procedural burden allocation. The legislative history specifically addressed the question of the burden of proof that would apply to the new statutory requirement that no criminal referral be in effect. The Senate Report explained (1 S. Rep. 97-494, *supra*, at 283 (emphasis added)):

> [T]he Secretary will have to meet all the requirements of *United States* v. *Powell*, 379 U.S. 48 (1964), including a showing that the individual investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that all the administrative steps required by the Code have been followed. As a *defense* to the enforcement of the summons, the taxpayer may show that the taxpayer's case has been referred to the Department of Justice.

Thus, it is apparent that Congress intended the referral restriction of Section 7602(c) to be a taxpayer defense rather than part of the prima facie showing to be made by the IRS.

This interpretation of the burden of proof with respect to the criminal referral restriction has been adopted by the Third Circuit in *Pickel* v. *United States*, 746 F.2d 176 (1984). The court there rejected the taxpayers' efforts to quash two IRS summonses where the agent's affidavit had not asserted that no Justice Department referral was in effect. The court stated that the taxpayers had not come forward with evidence to meet their burden, noting that "[t]he Pickels, as the parties opposing the summonses, bore the burden of showing * * * that a Justice Department referral had taken place" (*id.* at 184).[9] See also *United States* v. *Naden*, 57 A.F.T.R.2d (P-H) ¶ 86-632 (E.D. Cal 1986) (IRS "not required to make an affirmative showing of the absence of a Justice Department referral as part of * * * [its] prima facie case for enforcement"). These domestic summons cases are flatly inconsistent with the rationale of the decision below and with its premise that the government generally must show the absence of a referral as part of its prima facie case.

Moreover, fundamental principles of summons enforcement law strongly militate against the additional requirement imposed by the court below of demonstrating that the foreign proceedings have not reached a stage analogous to a Justice Department referral. Summons enforcement proceedings are intended to be summary in nature. See *Donaldson* v. *United States*, 400 U.S. 517 (1971). The court's role is limited to guarding against abuses of the summons power. See, *e.g.*, *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975); *United States* v. *Powell*, 379 U.S. at 57-58. Restrictions on that authority should not imposed " 'absent unambiguous directions from Congress.' " *United States* v. *Arthur Young & Co.*,

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[9] Of course, the government regularly furnishes the pertinent information to a taxpayer seeking, through informal inquiry or a discovery request, the evidence to discharge this burden. It remains, however, the taxpayer's burden to raise and establish such a defense in the domestic summons context.

465 U.S. 805, 816 (1984) (citation omitted). Here, however, the court has imposed an additional requirement on the IRS summons power—one that, contrary to the court's suggestion (App., *infra*, 13a), will impede the enforcement of tax treaty summonses. Each summons issued at the request of a treaty partner will require the U.S. "competent authority" to undertake an inquiry into the vagaries and detailed administration of various foreign legal systems, which may prove to be quite burdensome. This type of inquiry goes well beyond what has heretofore been viewed as necessary or appropriate for the enforcement of treaty summonses. See, *e.g.*, *United States* v. *Bache Halsey Stuart, Inc.*, 563 F. Supp. 898, 900-901 (S.D.N.Y. 1982).[10]

3. The issue presented here is one of great importance. The United States currently has in effect 31 tax treaties that include exchange of information provisions of the type contained in the Income Tax Convention with Canada. It also has several exchange of information executive agreements that are in effect with designated Carribean Basin countries. See I.R.C. § 274(h)(6)(C). These treaties and agreements are with the major trading and

[10] To the extent the decision below should be read as imposing in domestic summons cases as well the requirement that the affidavit assert the absence of a Justice Department referral, that requirement would also impede summons enforcement. It is true, as the court of appeals observed (App., *infra*, 13a), that government affidavits sometimes disclose referral status, but the government is under no legal obligation to do so. While it is ordinarily not difficult for the IRS to ascertain whether it has initiated a Justice Department referral (see I.R.C. § 7602(c)(2)(A)(i)), the statute also provides that a "Justice Department referral" is in effect when there has been a request by Justice for return information from the IRS pursuant to I.R.C. § 6103(h)(3)(B). See I.R.C. § 7602(c)(2)(A)(ii). It is quite difficult for the agent issuing the summons to determine whether there has been such a "reverse referral" in a given case.

economic partners of the United States and represent an important mechanism by which the United States and its treaty partners seek to prevent tax avoidance and evasion on an international level.

The IRS informs us that, during the period between January 1984 and July 1987, more than 1600 specific requests for information were made or received by the U.S. competent authority under the exchange of information provisions of our tax treaties. The success of the exchange of information program depends upon the cooperation of our treaty partners. Indeed, the United States depends to a a great extent on foreign nations' willingness to honor our requests for information, both in the tax area and in other enforcement areas. That cooperation might well be impaired, and the position of the United States in dealing with its treaty partners weakened, if the unnecessary obstacle to information exchange erected by the court of appeals in this case were allowed to stand. Moreover, if the conflict in the circuits on this issue were allowed to persist, identical treaty requests would meet with differing fates depending upon the circuit in which they arise, perhaps giving the appearance that the U.S. courts favor one country over another. Accordingly, the Court should act to resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

DECEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421
D.C. No. CV-84-511-C

PHILIP GEORGE STUART, SR., PETITIONER/APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT/APPELLEE

No. 86-3791
D.C. No. CV-84-512-M

MONS KAPOOR, PETITIONER/APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT/APPELLEE

Appeal from the United States District Court
for the Western District of Washington

Argued and Submitted
December 4, 1986—Seattle, Washington
Filed March 24, 1987

OPINION

Before: JAMES R. BROWNING, EUGENE A. WRIGHT, and
ROBERT BOOCHEVER, Circuit Judges.

Opinion by Judge BOOCHEVER; Dissent by Judge WRIGHT

BOOCHEVER, Circuit Judge:

Stuart and Kapoor, citizens and residents of Canada, appeal the district court's denial of their petitions to quash summonses of records held by their bank in Bellingham, Washington. The Internal Revenue Service issued the summonses at the request of the Canadian Department of National Revenue, pursuant to Articles XIX and XXI of the 1942 Income Tax Convention with Canada.

FACTS

Philip Stuart and Mons Kapoor (taxpayers) are citizens and residents of Canada. Both have accounts with the Northwestern Commercial Bank in Bellingham, Washington. In an attempt to determine their income tax liability for tax years 1980, 1981, and 1982, the Canadian Department of National Revenue (Revenue Canada or the department) seeks to examine all records in the bank's possession pertaining to accounts in taxpayers' names. Pursuant to Articles XIX and XXI of the Convention between the United States of America and Canada respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1399, T.S. No. 983 (as amended) (the treaty), Revenue Canada requested by letters dated January 3, 1984, that the Internal Revenue Service (IRS or the service) obtain these records through the issuance of summonses to the bank. Under the treaty, the competent authority for the country receiving the requests determines whether to honor them. Thomas J. Clancy, Director of Foreign Operations District, is the United States' competent authority. He stated in affidavits that the IRS had decided to honor these requests and to issue the summonses because: (1) the requested information may be relevant in determining the tax liability of Kapoor and Stuart; (2) the same type of information can be obtained

by Canadian tax authorities under Canadian law; and (3) the information requested was not already in the possession of the IRS. His affidavits also declared that Revenue Canada had requested the information to determine the correct tax liability of Stuart and Kapoor pursuant to a "criminal investigation, preliminary stage" and that he had determined Revenue Canada's requests were within the scope of the treaty. The service issued the summonses on April 2, 1984.

The IRS must give notice to any person whose records it seeks from a third party. I.R.C. § 7609(a)(1) (1982). When the taxpayers received notice of the summonses they directed the bank not to comply and petitioned the district court to quash the summonses pursuant to I.R.C. § 7609(b)(2). They claimed that the summonses were (1) not issued for lawful purposes, (2) did not seek information relevant to any inquiry concerning an internal revenue tax of the United States, and (3) that the information sought could be obtained directly by Revenue Canada under Canadian law. The taxpayers served interrogatories on the IRS requesting information regarding the purpose of Revenue Canada's investigation. The IRS refused to respond, claiming that discovery is not warranted where the taxpayers fail to demonstrate that triable issues exist.

A magistrate held a consolidated hearing on the petitions and recommended that the district court enforce the summonses. Over the taxpayers' objections to the magistrate's recommendations, the district court ordered the bank to comply with the summonses. This court granted a stay of enforcement pending appeal on July 14, 1986.

ANALYSIS

I. The Applicable Treaty

The taxpayers argue that the treaty of 1942 does not apply to these summonses. They point out that the Conven-

tion with Respect to Taxes on Income and on Capital, Sept. 26, 1980, United States-Canada, **reprinted in** 1 Tax Treaties (CCH) ¶ 1301 (1984) (1980 treaty), became effective on August 16, 1984, after the tax years in question and after the issuance of the summonses, but before the district court entered enforcement orders in either case. Article XXX of the 1980 treaty determines when its provisions enter into force:

> 2. The Convention shall enter into force upon the exchange of instruments of ratification and, subject to the provisions of paragraph 3, its provisions shall have effect:
>
> (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties) and XVIII (Pensions and Annuities), with respect to amounts paid or credited on or after the first day of the second month next following the date on which the Convention enters into force;
>
> (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the date on which the Convention enters into force; and
>
> (c) Notwithstanding the provisions of subparagraph (b), for the taxes covered by paragraph 4 of Article XXIX (Miscellaneous Rules) with respect to all taxable years referred to in that paragraph.
>
> 3. . . . .
>
> 4. Subject to the provisions of paragraph 5, the 1942 Convention shall cease to have effect for taxes for which this Convention has effect in accordance with the provisions of paragraph 2.

The government offers two arguments for application of the 1942 treaty. First, it contends that because the summonses address tax liability for 1980-82, subsection 2(b)

controls when Article XXVII, the exchange of information provision, enters into force. This subsection states that, "for other taxes," the convention goes into effect on the first of January immediately following the exchange of the instruments of ratification. They were exchanged on August 16, 1984. Because Article XXVII is not explicitly mentioned in subsections 2(a) or 2(c), the government asserts that it falls into the category of "other taxes." Accordingly, the 1980 treaty only applies to summonses investigating tax liability for years commencing on or after January 1, 1985.

Alternatively, if the effective date of Article XXVII is determined by section 2 and not subsection 2(b) (i.e., if the 1980 treaty applies to any request for information made after August 16, 1984, regardless of the tax year to which the information pertains), the government notes that these requests were made on January 3, 1984, the summonses were issued on April 2, 1984, and the petitions to quash filed on April 20, 1984; all of these events preceded the exchange of instruments. The taxpayers argue that the determinative dates should be those on which the enforcement orders were issued, March 25, 1985, and December 11, 1985, respectively.

We review this question of treaty interpretation, one of first impression, de novo. We find the government's second argument persuasive and therefore need not address its first. The information exchange provisions of both treaties set out when the United States or Canada may honor the other's requests for information. The date of the request or, at the latest, the date of the decision to honor it should determine which treaty applies. Because these dates are prior to August 16, 1984, we look to the 1942 treaty in reviewing the district court's order granting enforcement of these summonses.

II. Political Question

The 1942 treaty has two articles dealing with information exchange, Article XIX and Article XXI, whose relevant parts follow:

Article XIX

> With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to **obtain under its revenue laws** in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

Article XXI

> 1. If the Minister [of the Department of National Revenue] in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner [of the IRS], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner **is entitled to obtain under the revenue laws of the United States of America.**

1942 Treaty, art. XIX, para. 1 and art. XXI para. 1 (emphasis added).

The government argues that the determination of the competent authority to honor a request conclusively establishes that Revenue Canada's request was made for a legitimate purpose under the treaty. Courts should not review this determination as it impinges on the executive

branch's conduct of foreign affairs. In essence, the government argues that the IRS's decision on whether to honor a request is a political question and therefore not justiciable. The application of the political question doctrine is a legal issue, which we review de novo.

In **Baker v. Carr,** 369 U.S. 186 (1982), the Supreme Court examined three factors to determine whether a question was political and therefore not justiciable: (1) does the text of the Constitution commit the issue "to a coordinate political department;" (2) does the judiciary lack "discoverable and manageable standards for resolving it;" and (3) would judicial intervention express a "lack of the respect due coordinate branches of government." **Id.** at 217. Here, the terms of the treaty permit the IRS to furnish Canada only with information that the service is entitled to obtain under the revenue laws of the United States. In other words, the United States may obtain information for Canada to the same extent that it could do so for its own use and subject to the same limitations. **See United States v. A.L. Burbank & Co.**, 525 F.2d 9, 13 (2d Cir. 1975), **cert. denied,** 426 U.S. 934 (1976). The question of what information can be obtained under the revenue laws of the United States is not one committed by the text of our Constitution to another branch, does not require courts to move beyond areas of judicial expertise, and does not appear to implicate substantial prudential considerations against judicial intervention.

The doctrine of judicial review commits the task of interpreting statutes primarily to the courts. Court have acquired from domestic cases substantial expertise in interpreting these revenue laws and, as more specifically pertains here, in reviewing requests for enforcement. Although one court has suggested that the international character of treaty requests counsels against judicial intervention. **United States v. Manufacturers & Traders**

Trust Co., 703 F.2d 47, 52-53 (2d Cir. 1983), our examination of the first two factors of the **Baker v. Carr** analysis convinces us that we should not apply the political question doctrine here. Moreover, this circuit has previously rejected the argument that the doctrine applies without exception to treaties simply because affairs of state are involved:

> It is the role of the judiciary to interpret international treaties and to enforce domestic rights arising from them. **See, e.g., Kolovrat v. Oregon,** 366 U.S. 187 (1961); **Perkins v. Elg,** 307 U.S. 325 (1939); **Charlton v. Kelly,** 229 U.S. 447 (1913); **United States v. Rauscher,** 119 U.S. 407 (1886). In those few cases involving interpretation of treaties when the political question doctrine precludes review, that doctrine has narrow confines. The principal area of non-justiciability concerns the right of the executive to abrogate a treaty. That is not the issue here.

United States v. Decker, 600 F.2d 733, 737 (9th Cir.)(some citations omitted), **cert. denied,** 444 U.S. 855 (1979).

Summonse in domestic cases are not self-enforcing. I.R.C. §§ 7402(b), 7604(a); **see United States v. Harris,** 628 F.2d 875, 879 (5th Cir. 1980). Our analysis of the political question doctrine does not convince us that we should treat summonses issued at the request of a treaty partner differently. "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." **United States v. Powell,** 379 U.S. 48, 58 (1964).

III. Good Faith

Courts will enforce a domestic summons only if it was issued in good faith. The four major elements of good faith were first set out in **Powell,** 379 U.S. at 57-58:

> [The Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose,

> that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . .

The government argues that the good faith limitations placed on domestic summonses do not apply to summonses issued at the request of a treaty partner. We review this contention de novo. **Ponsford v. United States,** 771 F.2d 1305, 1307-08 (9th Cir. 1985); **see also United States v. McConney,** 728 F.2d 1195, 1202-04 (9th Cir.)(en banc), **cert. denied,** 469 U.S. 824 (1984). Even if these limitations apply in full force to treaty summonses, the government contends that the district court correctly concluded that the summonses were issued in good faith. We review the district court's finding of good faith under the clearly erroneous standard. **Ponsford,** 771 F.2d at 1307-08.

A. Application of Good Faith to Treaty Summonses

According to the taxpayers, the summonses were not issued in good faith because their purpose was improper; to aid Revenue Canada in its "criminal investigation, preliminary stage." The legitimate purpose element of good faith has changed since **Powell.** It originated in the Supreme Court's concern that the IRS might use its power to issue administrative summonses in order to harass taxpayers, to pressure them into settling collateral disputes, or, as Stuart and Kapoor assert is occurring in this instance, to obtain evidence for use in a criminal prosecution. **Powell,** 379 U.S. at 58; **Reisman v. Caplin,** 375 U.S. 440, 449 (1964). But as criminal and civil liability for violation of the tax laws are inherently intertwined, there has been some difficulty in deciding how far a criminal investigation can progress before the IRS must relinquish its power to issue summonses. **See Donaldson v. United States,** 400 U.S. 517, 531-36 (1971); **United States v.**

LaSalle Nat'l Bank, 437 U.S. 298, 306-21 (1978). A majority of five justices held in **LaSalle** that the IRS may issue summonses as long as it has not made a recommendation of criminal prosecution to the Department of Justice and has "not abandon[ed] in an institutional sense . . . the pursuit of civil tax determination or collection." **Id.** at 318. Justice Stewart, in a dissent joined by three other justices, predicted that determining "institutional good faith" would be unworkable and argued for a "bright-line test:" summonses in criminal investigations must be issued prior to a recommendation for criminal prosecution. **Id.** at 320-21.

Congress adopted the minority's view when it passed the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982. Pub. L. No. 97-248, 96 Stat. 324 (1982); **see** Joint Comm. on Taxation, **General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982,** 97th Cong., 2d Sess. 234-36 (Comm. Print 1982); **see also** S. Rep. No. 494, 97th Cong., 2d Sess. 285-87 (1982), **reprinted in** 1982 U.S. Code Cong. & Admin. News 781, 1030-32. TEFRA allows the IRS to use its summonsing authority in investigations "into any offense connected with the administration or enforcement of the internal revenue laws" until the service refers the matter to the Justice Department. I.R.C. § 7602(b)-(c); **see Pickel v. United States,** 746 F.2d 176, 183-84 (3rd Cir. 1984).

The government argues that the good faith doctrine's requirement of a legitimate purpose should not apply to summonses issued at the request of a treaty partner. It urges this circuit to adopt the holding of **Manufacturers & Traders Trust Co.,** 703 F.2d at 49-53, a case involving the same treaty. The Second Circuit held that the legitimate purpose standard for summonses issued pursuant to treaty requests is less stringent than the standard developed in the decisions involving domestic cases. **Id.** It concluded that the phrase in Article XXI, "as the Commissioner is entitled

to obtain under the revenue laws of the United States of America" does not necessarily mean that the "judicial gloss" of the Supreme Court's decisions in **LaSalle** and **Powell** should apply to treaty summonses. After discussing the policy considerations upon which **LaSalle** rests, the Second Circuit held that "there is no purpose to applying" the limitations that prohibit the use of summonses to obtain information that will also be used for "criminal-investigatory-prosecutory purposes" or to obtain information that Revenue Canada will share with other officials concerned with criminal prosecution. **Id.** at 50-52. The court believed that the policies that led the Supreme Court to impose these limitations—concerns about infringing on the role of grand juries and about expanding discovery powers in criminal prosecutions—simply had no relevance to Canada, which does not employ grand juries and does not share "our position on pre-trial discovery in . . . criminal cases" or to Canadian citizens, who "ha[ve] no right to expect that [they] will have the protection accorded by this country to its own taxpayers and potential defendants." **Id.** at 52.

We decline the government's request to adopt **Manufacturers & Traders Trust Co.** That case involved a summons issued prior to Congress's imposition, via the TEFRA amendments, of the dissenters' position in **LaSalle.** Faced with the majority decision in **LaSalle,** the Second Circuit was understandably reluctant to delve into the institutional good faith of Revenue Canada, an agency of a foreign country. 703 F.2d at 52-53. After TEFRA, no such inquiry is necessary. Now the requirement is only that there had been no referral for criminal prosecution.

We hold that the good faith doctrine applies to summonses issued under the treaty. Accordingly, the next question we must address is whether the Canadian investigation has progressed to a stage analogous to a Justice

Department referral: (1) has Revenue Canada recommended that the Canadian Department of Justice criminally prosecute Kapoor and Stuart or (2) has Revenue Canada requested the summonses at the behest of the Canadian Department of Justice? See I.R.C. § 7602(c)(2)(A)(i)-(ii).

B. Prima Facie Showing of Good Faith

The affidavits of the IRS contain identical statements concerning the purposes of Revenue Canada's investigation:

> By letter Dated January 3, 1984, the Government of Canada, through Mr. Philip Pinkus, Director, Provincial and International Relations Division, Revenue Canada, made a request for information to be used to determine the correct tax liability of [the taxpayers], under the laws of Canada. The Canadian taxing authorities' investigation of [the taxpayers] is a criminal investigation, preliminary stage.

In its briefs and at oral argument, the government asserted that the burden is on the taxpayers to show that the criminal investigation in Canada has reached a stage analogous to a referral to the Department of Justice. They must do so without the benefit of discovery unless they can allege specific facts that raise a sufficient doubt concerning the department's purpose. **United States v. Samuels, Kramer & Co.**, 712 F.2d 1342, 1347-48 (9th Cir. 1983); **United States v. Church of Scientology**, 520 F.2d 818, 823-24 (9th Cir. 1975).

The government can establish its prima facie case for enforcement of a domestic summons with an affidavit from the agent who issued the summons stating that the requirements of good faith doctrine have been met: (1) the investigation is being conducted for a legitimate purpose;

(2) the inquiry is relevant to the purpose; (3) the information sought is not already within the service's possession; and (4) the required administrative steps have been followed. **Id.** at 821; **see also Powell**, 379 U.S. at 57-58; **Samuels, Kramer & Co.**, 712 F.2d at 1344-45. The government conceded at oral argument that its affidavits in domestic cases usually state that there has been no referral for prosecution, and affidavits quoted in reported decisions bear this out. **See, e.g. Moutevelis v. United States**, 727 F.2d 313, 314 (3d Cir. 1984). We hold that in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral. The service is in the best position to determine this: it can consult with Canada's competent authority and can be expected to have greater familiarity with Canadian administrative procedures. We do not believe that requiring the IRS to make such a statement will unduly restrict the service's summonsing authority or impede enforcement of summonses. Moreover, this requirement avoids the anomaly of "placing a burden of proof upon the taxpayer and then denying access to what may be the very information needed to meet that burden." **United States v. Stuckey**, 646 F.2d 1369, 1373-74 (9th Cir. 1981), **cert. denied**, 455 U.S. 942 (1982).

Although we are convinced that disputes such as presented here are justiciable, we are also mindful of the importance of promptly disposing of challenges to summonses. **See United States v. Kis**, 658 F.2d 526. 533-36 (7th Cir. 1981), **cert. denied**, 455 U.S. 1018 (1982). Delay may defeat the purpose for which the summons is sought. By requiring the affidavit to contain information establishing that the summonses could be obtained under domestic law, the delay encountered in appeals such as this one would be avoided. Ambiguous statements about the purpose of an investigation invite challenges and lead to delay, as this case illustrates.

We conclude that it was clear error to find that the affidavits made a prima facie showing of legitimate purpose. The court on remand should allow the IRS the opportunity to amend its affidavits to include the required statement, **see United States v. Lincoln First Bank**, 45 A.F.T.R.2d (P-H) 80-942, 80-944 to 80-945 (S.D.N.Y. 1980)

C. Late Submission of Material by the IRS

One additional matter concerning the good faith showing requires discussion. After the case had been argued and submitted, the government sent additional materials to us. Included in this material were purported copies of portions of Revenue Canada's Operations Manual outlining the stages of criminal tax investigations. The government claims the excerpts indicate that the Revenue Canada had not yet recommended criminal prosecution and asks us to consider the excerpts under rule 44.1. Fed. R. Civ. P. 44.1. The taxpayers object to the government's submission.

Approximately one-half of the material the government submitted is additional briefing on domestic law. The government did not seek leave of the court before filing it and thereby violated subsections (c) and (j) of appellate rule 28. Fed. R. App. P. 28(c) & (j). We strike this portion and shall not consider it. We deal with the remaining material under rule 44.1, which states:

> **Determination of Foreign Law**
>
> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible

> under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. We note with concern that the government has made similar late submissions of foreign law materials in at least two other reported cases of this type. **See Harris v. United States**, 768 F.2d 1240, 1242 (11th Cir. 1985), **vacated**, 107 S.Ct. 450 (1986)(remanded for reconsideration in light of **O'Connor v. United States**, 107 S. Ct. 347 (1986)); **Coplin v. United States**, 761 F.2d 688, 691 (Fed. Cir. 1985), **aff'd sub nom. O'Connor v. United States**, 107 S. Ct. 347 (1986). We realize that we may consider foreign law materials at any time, whether or not submitted by a party, and that late submissions often have been considered in cases interpreting treaties. Fed. R. Civ. P. 44.1; **see Coplin**, 761 F.2d at 691-92. We decline to consider these. The purpose of rule 44.1's notice requirement is to avoid unfairly surprising opposing parties. Fed. R. Civ. P. 44.1 advisory committee's notes. Our task is certainly easier if a party who intends to raise an issue of foreign law does so as early as possible. Submission of such materials in the district court may well have the salutary effect of avoiding the delay encountered in appeals. Absent special circumstances, parties should present issues of foreign law in their appellate briefs at the latest. The excerpts submitted to us arrived without exact citations as to their source or their present validity. In fairness to the taxpayers and in order to encourage early submission of such material in the future, we decided the good faith issue on the briefs and oral argument. The government may submit the additional material upon remand, if necessary. At that time the taxpayers will have adequate opportunity to respond.

IV. Discovery

The taxpayers claim that the district court abused its discretion in denying their requests for discovery. If the IRS can establish a prima facie showing of legitimate purpose by amending its affidavits, submitting the excerpts from Revenue Canada's operating manual, or both, Stuart and Kapoor have the burden of overcoming that showing. They must make a substantial challenge alleging specific facts that raise "sufficient doubt" about the validity of the summonses. If they are unable to carry this burden, they are not entitled to discovery. **Samuels, Kramer & Co.**, 712 F.2d at 1347-48; **Church of Scientology**, 520 F.2d at 823-25.

V. Scope of Summons

The taxpayers challenge the summonses as overly broad. We review the district court's finding of relevancy for clear error and find none. The IRS has the authority to summon any records that may be "relevant" or "material" to a tax investigation. I.R.C. § 7602(a)(1). The service need show only that the materials "would throw light upon the correctness of the taxpayer's returns." **United States v. Ryan**, 455 F.2d 728, 733 (9th Cir. 1972). Relevancy, like legitimate purpose, is an element of good faith and therefore may be established by affidavit. **Liberty Fin. Servs. v. United States**, 778 F.2d 1390. 1392 (9th Cir. 1985). The taxpayers failed to allege specific facts and to produce some evidence establishing any doubt about the relevancy of the documents to which the summonses apply.

CONCLUSION

The orders of the district court enforcing the summonses are reversed and the petitions are remanded for proceedings consistent with his opinion.

REVERSED and REMANDED.

WRIGHT, Circuit Judge, dissenting:

I dissent because the majority opinion creates an unnecessary intercircuit split, imposes new burdens on the competent authority and meddles unnecessarily in Canadian internal affairs. Since I find that the competent authority has met its burden, I would enforce the summonses. "My belief is that a remand will only delay the conclusion of the case." Chambers, J., dissenting in *Neuschafer v. McKay*, 807 F.2d 839, 842 (9th Cir. 1987) (Chambers, J., dissenting).

In order to enforce a tax summons, the IRS need only make a showing of good faith. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *see also Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985) (burdens of establishing good faith is "minimal"). The courts look only to the competent authority's affidavit to determine whether "good faith" has been shown. *See United States v. Bache Halsey Stuart, Inc.*, 563 F. Supp. 898, 900-01 (S.D.N.Y. 1982); *Liberty*, 778 F.2d at 1392. No inquiry is made into the affidavit itself. *See id.*

Here, the competent authority's affidavit stated that (1) the Canadian request was within the scope of the treaty; (2) it was appropriate to honor the request; (3) the requested information may be relevant to the determination of current tax liabilities of Stuart and Kapoor under Canadian law; and (4) the same type of information could be obtained by Canadian authorities under Canadian law.

That affidavit shows good faith. It addresses the elements of *Powell*. In *Bache*, the competent authority submitted an affidavit almost identical to that here, and the court held that a prima facie showing was made. *Bache*, 563 F. Supp. at 900 n.2.

If the competent authority makes a showing, the taxpayers bear a heavy burden in refuting it. *United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978).

"Because criminal and civil fraud liabilities [in tax investigations] are coterminous, the Service *rarely* will be found to have acted in bad faith by pursuing the former." *Id.* (emphasis added).

Here, Stuart and Kapoor did not show an improper purpose. They made bare assertions that Canada's criminal investigation, preliminary stage, is analogous to a Justice Department referral, and that the competent authority lacked a proper purpose for his enforcement request.

This is hardly enough to carry a light burden, much less a heavy one. These Canadian taxpayers have failed to refute the competent authority's showing. *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1347 (9th Cir. 1983) (mere allegations are not enough to refute showing of good faith). The district court's finding was not clearly erroneous.[1]

The majority opinion holds that this affidavit fails to make a prima facie showing of good faith because its exact language differs from that used in *Powell* to describe the elements of good faith. *Powell*, 379 U.S. at 57-58. *Powell* does not require strict language. Rather, it requires merely a showing containing the elements of good faith. A court need not search the showing for specific words, but decides only whether a showing has been made.

The majority does not stop at requiring specific language in the affidavit. It goes on the create an additional requirement for the good faith showing. This would

[1] The clearly erroneous standard requires the appellate court to accept a lower court's finding of fact unless the appellate court is left with the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985). Even accepting the majority's interpretation of the good faith test, the difference between the language in the competent authority's affidavit and the language the majority demands is so minor that the district court's ruling can not be deemed clearly erroneous.

require that the competent authority must, in addition to the *Powell* language, "make an affirmative statement that the investigation has not reached a stage analogous to a Justice Department referral." Op. at 14-15. The majority justifies this by implying that the statement is required by the revenue laws of the United States, and thus by the treaty. Op. at 7, 13. It also says that (1) the IRS is better able to make this determination; (2) this will not impede enforcement of the summons; and (3) this will reduce litigation and delay in enforcement. *Id.* at 15.

Only one circuit has considered the good faith requirement in a request for summons under this treaty. The Second Circuit held in *United States v. Manufacturers & Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983), that "the requirements for summons-enforcement are not in all respects precisely the same as for domestic cases." *Manufacturers*, 703 F.2d at 50.

The majority opinion rejects the holding of *Manufacturers* and creates an intercircuit conflict. The reasoning appears to be that (1) the Tax Equity and Fiscal Responsibility Act of 1982 modified the good faith test requirement and (2) "revenue laws of the United States" should include statutes *and* Supreme Court decisions.

These are not sound bases to reject the holding of *Manufacturers*. That case is not undercut by the fact that the Act (TEFRA) eliminated the requirement that one requesting information from the IRS not abandon the civil investigation intent. The majority opinion observes that the Second Circuit was "reluctant to delve into the institutional good faith of Canada." Op. at 12. That court's approach was consistent with current law.

Manufacturers does not say that Supreme Court opinions are not part of the "revenue laws of the United States," and neither does it say that *Powell* and *LaSalle* do not apply. Op. at 12-13. It does say that "the judicial gloss need not be the same for an international case of this type

as for a wholly domestic one." *Manufacturers*, 703 F.2d at 51. It holds that, because this country's policies of (1) pursuing criminal prosecutions through the Justice Department, rather than the IRS and (2) limiting criminal prosecution discovery, do not apply in Canada, we should relax the good faith test for Canadian tax information requests. *Id.* at 52.

The Second Circuit opinion shows a healthy respect for the United States' responsibilities under an international treaty. The court recognized "considerations special to dealings between separate nations" and noted that

> Canada might wonder what concern the United States has in applying its internal policy to a case in which this country's taxes and citizens are not at all involved—only Canada's. More than that, our international relations with Canada might be damaged and the executives in both countries might be embarrassed in an organ in this country were to characterize a Canadian request as made in "bad faith" where that request was perfectly appropriate under the law of the requesting country.

Manufacturers, 703 F.2d at 53.

I also disagree with the majority's other justification. This new requirement will necessarily impede the enforcement of a summons because it requires the competent authority to make additional findings. It will *increase* rather than decrease enforcement litigation because the courts will have to determine ultimately exactly what kinds of Canadian investigations are "analogous" to a Justice Department referral.

The good faith issue should have been decided without a remand. In the course of oral argument, it appeared there was some confusion over the government's burden to make an adequate showing to justify a warrant. To assist the court, government counsel tendered supplemental materials but without complying with procedural rules, as

noted by the majority. But there is precedent for doing just what counsel has done here in cases involving the interpretation of treaties. *Coplin v. United States*, 761 F.2d 688, 691 (Fed. Cir. 1985), *aff'd sub nom. O'Connor v. United States*, 107 S. Ct. 347 (1986).

The taxpayers objected to our considering the materials, not because they were irrelevant or inaccurate statements of Canadian procedures but only because the rule had not been followed. The simple and expedient way to handle this would have been to invite the taxpayers to respond, giving a reasonable time. Had we done so, this case would long since have been decided.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421
CV-84-511-C

PHILIP GEORGE STUART, SR., PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

No. 86-3791
CV-84-512-M

MONS KAPOOR, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

APPEAL from the United States District Court for the District of WESTERN WASHINGTON (SEATTLE).

[Filed Sept. 11, 1987]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of WESTERN WASHINGTON (SEATTLE) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

A TRUE COPY
ATTEST SEP. 8, 1987
CATHY A. CATTERSON

Clerk of Court

by: /s/ Don McFarland
DON FARLAND MC
Deputy Clerk

This certification constitutes the mandate of the Court.

Filed and entered 3-24-87

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4421

PHILIP GEORGE STUART, SR., PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

No. 86-3791

MONS KAPOOR, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Aug 27, 1987]

ORDER

Before: BROWNING, Chief Judge, WRIGHT and BOOCHEVER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-511C

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Filed Dec. 11, 1987]

FINAL JUDGMENT AND ENFORCEMENT ORDER

This Court having considered the Petition to Quash Summons, the verified Response to that petition, the positions and arguments of the parties, the Report and Recommendation of United States Magistrate John L. Weinberg and the Court finding that: (1) the summons was issued for a legitimate purpose; (2) the summoned data may be relevant to that purpose; (3) the summoned data are not already in the Internal Revenue Service's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed, it is now therefore

ORDERED that the Petition to Quash Summons is denied; it is further

ORDERED that Northwest Commercial Bank shall comply with and obey the summons served upon it, by appearing at the offices of the Internal Revenue Service, 104 West Magnolia, Bellingham, Washington, before Special Agent Deborah Gavin or her designee at a time to be agreed upon by the parties but not later than twenty days

after entry of this Order, then and there to testify and to produce for inspection and copying all of the books, papers, records and other data described in the summons served upon it, such appearance, testimony, inspection and copying to continue from day to day until complete.

Done this 11th day of December, 1985.

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

Presented by:

/s/ F. Michael Kovach Jr.
F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-511C

PHILIP GEORGE STUART, SR., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Received Oct. 2, 1985]

REPORT AND RECOMMENDATION FOR ENFORCEMENT OF I.R.S. SUMMONS

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner is a citizen and resident of Canada. The Canadian government is attempting to determine his income tax liabilities, under Canadian law, for the years 1980, 1981 and 1982. The investigation is a "criminal tax investigation, preliminary stage."

The United States and Canada are signatories to the Income Tax Convention with Canada, March 4, 1942 (56 Stat. 1399) ("the Convention"). Under its terms, one country may request the other to obtain, and provide to the other, information useful to the requesting country in assessing income taxes.

In this case, Canada requested the United States to provide information relating to petitioner's liability for Cana-

dian income tax. The request letter itself is not part of the record in this court, as it is kept secret pursuant to the agreement of the two countries. Thomas J. Clancy, the responsible official with the Internal Revenue Service, describes the letter in his affidavit.

Pursuant to the request, I.R.S. Special Agent Deborah Gavin issued a summons to the Northwestern Commercial Bank in Bellingham, Washington. The summons requested all records pertaining to accounts in petitioner's name during the three years in question, including but not limited to transactions involving loans, bonds, stocks and/or other investment transactions. Petitioner received notice of the summons,[1] directed the bank not to comply, and petitioned this court, pursuant to 26 U.S.C. § 7609, to quash the summons. The United States moves for summary enforcement. The parties have submitted pleadings, and presented oral argument.

Petitioner has also submitted a set of interrogatories. The United States has declined to answer them, asserting that discovery is not appropriate in an I.R.S. summons case where there are no relevant factual issues. While there is no formal motion to compel, petitioner requests an order directing the United States to respond to the interrogatories.

ISSUES

The parties present four issues relating to the enforceabilty of the summons:

(1) Can an I.R.S. summons be used where the tax liability is for Canadian taxes, not United States taxes?

[1] In this court, petitioner initially claimed he did not receive timely notice of the summons. He later withdrew that contention.

(2) Does the criminal nature of the Canadian investigation render the summons improper under United States laws?

(3) What is the impact of Canadian law upon the enforceability of the summons?

(4) Has the United States made a sufficient showing that the documents covered by the summons are relevant to petitioner's Canadian tax liability?

DISCUSSION

Powell Requirements for Summonses Under the Convention. The Convention provides that the country receiving the request furnishes information which its competent authorities

> "have at their disposal or are in a position to obtain under its revenue laws . . . ." Article XIX.

Upon proper request from Canada, the United States Commissioner of Internal Revenue may furnish

> ". . . such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America." Article XXI.

Thus, the enforceability of an I.R.S. summons issued pursuant to a request under the Convention is to be determined under the same standards as other I.R.S. summonses. Those standards are set forth in *United States v. Powell*, 379 U.S. 48, 57-58 (1964). An I.R.S. summons must: (1) be issued for a proper purpose; (2) seek information relevant to that purpose; (3) seek information not currently in the government's possession; and (4) satisfy all of the administrative steps regarding the service and issuance of the summons.

Canadian Tax Liability. Petitioner asserts this summons was not issued for a proper purpose because there is no allegation petitioner has any liability for United States

taxes. This contention has no merit, for the reasons discussed by the Second Circuit in *U. S. v. A. L. Burbank & Co., Ltd.*, 525 F.2d 9, at 12-14 (2d Cir. 1975). The purpose of these portions of the Convention is to permit the I.R.S., in assisting Canada to assess and enforce Canadian taxes, to utilize procedural techniques which are available for assessing United States tax liabilities.

Criminal Investigation. The I.R.S. may not issue a summons where a "Justice Department referral is in effect" with respect to a United States taxpayer. 26 U.S.C. §7602(c) (as amended in 1982). Petitioner contends that, because the Canadian authorities are conducting a "criminal investigation, preliminary stage," United States law prohibits the use of a summons in his case.

In *U. S. v. Manufacturers and Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983), the Court held that summonses can be issued by the I.R.S. under the Convention in cases involving Canadian criminal investigations, even if such a summons would not be proper in connection with a similar United States criminal investigation. The Court reasoned that I.R.S. summonses cannot be used in domestic criminal cases because such case would evade limitations under United States law on discovery in criminal cases, and usurp the function of the grand jury. The Court found these considerations of domestic law did not support similar limitations where the criminal investigation was in Canada. Under the Second Circuit's rationale, therefore, even if the Canadian authorities have invoked a procedure analogous to a Justice Department referral, the I.R.S. can nevertheless issue a summons upon request under the Convention.

In this case, however, it is not necessary to reach that issue. The only evidence in the record as to the nature and status of the Canadian investigation is that the Canadian authorities,

> ". . . made a request for information to be used to determine the correct tax liability of [petitioner], under the laws of Canada. The Canadian taxing authorities' investigation of [petitioner] is a criminal investigation, preliminary stage."

Affidavit of Thomas J. Clancy, p. 2. See also, declaration of Deborah Gavin, p. 2.

Petitioner has not established that there have been any steps taken in the Canadian criminal investigation which would be analogous to a Justice Department referral. Nor would petitioner's proposed interrogatories elicit that information. Even if this Court were to reach a conclusion different from that of the Second Circuit in *Manufacturers and Traders Trust*, petitioner would have the burden of showing that the Canadian authorities have invoked a procedure analogous to a Justice Department referral. Because he has not so shown, his contention in this respect must fail.

Canadian Law. Petitioner next contends that the summons should not be enforced because obtaining access to records in this manner would violate Canadian law relating to search warrants. This contention is without merit for at least three independent reasons.

First, the Convention contemplates that the law of the country *receiving* the request will govern in determining what information is or is not available. Canada makes the request; the I.R.S. then furnishes such relevant information as it, ". . . is entitled to obtain under the revenue laws of the United States of America . . Article XXI.

Second, even if issues of Canadian law are relevant, the courts of that country are a far preferable forum for determining whether the procedures invoked here constitute a violation of Canadian law. If petitioner persuades the courts of Canada that there were such violations in obtaining information pursuant to this summons, those courts can afford appropriate relief.

Finally, even if the issues of Canadian law were properly before this court, petitioner has not made a persuasive showing of any violation. He contends the Canadian authorities were required to obtain a search warrant for the records in question. He does not explain, however, how a Canadian judge could issue a search warrant for a bank in Bellingham, Washington. Furthermore, the United States has persuasively argued that the I.R.S. summons is at least as analogous to an "investigation," under §231(1) of the Income Tax Act of Canada, as it is to a "search," under §231(4). No search warrant is required to enter premises to examine books, records and accounts pursuant to an "investigation."

Relevance of Documents. Petitioner contends there has not been a sufficient showing that the documents covered by the summons are relevant to his Canadian tax liability for 1980 through 1982. For obvious reasons, the I.R.S. is not required to demonstrate prospectively the precise relevance of documents which they are seeking to obtain. Bank account records, including transactions dealing with loans, stocks, bonds and other investments, are reasonably calculated to be relevant to income tax liability for the corresponding years. Petitioner's contention in this respect is not persuasive.

CONCLUSION

For the foregoing reasons, petitioner's challenges to the enforceability of the summons are without merit. The court should find that:

(1) The requirements of the Convention and of *U. S. v. Powell, supra*, have been satisfied;

(2) There are no relevant factual issues, and the court should therefore decline to require the United States to respond to petitioner's interrogatories;

(3) The petition to quash the summons should be denied; and

(4) The Motion for Summary Enforcement should be granted.

A proposed order accompanies this Report and Recommendation.

The court should note that there are two cases pending which are assigned to different District Judges, and which appear to be identical as to all facts and issues except the identity of the Canadian resident who is the petitioner. The cases are *Philip George Stuart v. United States*, C84-511C and *Mon Kapoor v. United States*, C84-512M. The counsel are the same in both cases, and have identified no relevant differences between the cases. The same Report and Recommendation and proposed order is being filed in each case.

DATED this 30th day of September, 1985.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-512M

MONS KAPOOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

[Filed Nov. 29, 1985]

FINAL JUDGMENT AND ENFORCEMENT ORDER

This Court having considered the Petition to Quash Summons, the verified Response to that petitioner, the positions and arguments of the parties, the Report and Recommendation of United States Magistrate John L. Weinberg and the Court finding that: (1) the summons was issued for a legitimate purpose; (2) the summoned data may be relevant to that purpose; (3) the summoned data are not already in the Internal Revenue Service's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed, it is now therefore

ORDERED that the Petition to Quash Summons is denied; it is further

ORDERED that Northwest Commercial Bank shall comply with and obey the summons served upon it, by appearing at the offices of the Internal Revenue Service,

104 West Magnolia, Bellingham, Washington, before Special Agent Deborah Gavin or her designee at a time to be agreed upon by the parties but not later than twenty days after entry of this Order, then and there to testify and to produce for inspection and copying all of the books, papers, records and other data described in the summons served upon it, such appearance, testimony, inspection and copying to continue from day to day until complete.

Done this 25th day of March, 1985.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
United States District Judge

Presented by:

/s/ F. Michael Kovach, Jr.
F. MICHAEL KOVACH, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6605

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil No. C84-512M

MONS KAPOOR, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

[Filed Oct. 1, 1985]

REPORT AND RECOMMENDATION FOR ENFORCEMENT OF I.R.S. SUMMONS

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner is a citizen and resident of Canada. The Canadian government is attempting to determine his income tax liabilities, under Canadian law, for the years 1980, 1981 and 1982. The investigation is a "criminal tax investigation, preliminary stage."

The United States and Canada are signatories to the Income Tax Convention with Canada, March 4, 1942 (56 Stat. 1399) ("the Convention"). Under its terms, one country may request the other to obtain, and provide to the other, information useful to the requesting country in assessing income taxes.

In this case, Canada requested the United States to provide information relating to petitioner's liability for Canadian income tax. The request letter itself is not part of the record in this court, as it is kept secret pursuant to the agreement of the two countries. Thomas J. Clancy, the responsible official with the Internal Revenue Service, describes the letter in his affidavit.

Pursuant to the request, I.R.S. Special Agent Deborah Gavin issued a summons to the Northwestern Commercial Bank in Bellingham, Washington. The summons requested all records pertaining to accounts in petitioner's name during the three years in question, including but not limited to transactions involving loans, bonds, stocks and/or other investment transactions. Petitioner received notice of the summons,[1] directed the bank not to comply, and petitioned this court, pursuant to 26 U.S.C. § 7609, to quash the summons. The United States moves for summary enforcement. The parties have submitted pleadings, and presented oral argument.

Petitioner has also submitted a set of interrogatories. The United States has declined to answer them, asserting that discovery is not appropriate in an I.R.S. summons case where there are no relevant factual issues. While there is no formal motion to compel, petitioner requests an order directing the United States to respond to the interrogatories.

ISSUES

The parties present four issues relating to the enforceability of the summons:

(1) Can an I.R.S. summons be used where the tax liability is for Canadian taxes, not United States taxes?

---

[1] In this court, petitioner initially claimed he did not receive timely notice of the summons. He later withdrew that contention.

(2) Does the criminal nature of the Canadian investigation render the summons improper under United States laws?
(3) What is the impact of Canadian law upon the enforceability of the summons?
(4) Has the United States made a sufficient showing that the documents covered by the summons are relevant to petitioner's Canadian tax liability?

DISCUSSION

Powell Requirements for Summonses Under the Convention. The Convention provides that the country receiving the request furnishes information which its competent authorities

> "have at their disposal or are in a position to obtain under its revenue laws . . . ." Article XIX.

Upon proper request from Canada, the United States Commissioner of Internal Revenue may furnish

> ". . . such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America." Article XXI.

Thus, the enforceability of an I.R.S. summons issued pursuant to a request under the Convention is to be determined under the same standards as other I.R.S. summonses. Those standards are set forth in *United States v. Powell*, 379 U.S. 48, 57-58 (1964). An I.R.S. summons must: (1) be issued for a proper purpose; (2) seek information relevant to that purpose; (3) seek information not currently in the government's possession; and (4) satisfy all of the administrative steps regarding the service and issuance of the summons.

Canadian Tax Liability. Petitioner asserts this summons was not issued for a proper purpose because there is no allegation petitioner has any liability for United States

taxes. This contention has no merit, for the reasons discussed by the Second Circuit in *U. S. v. A. L. Burbank & Co., Ltd.*, 525 F.2d 9, at 12-14 (2d Cir. 1975). The purpose of these portions of the Convention is to permit the I.R.S., in assisting Canada to assess and enforce Canadian taxes, to utilize procedural techniques which are available for assessing United States tax liabilities.

Criminal Investigation. The I.R.S. may not issue a summons where a "Justice Department referral is in effect" with respect to a United States taxpayer. 26 U.S.C. §7602(c) (as amended in 1982). Petitioner contends that, because the Canadian authorities are conducting a "criminal investigation, preliminary stage," United States law prohibits the use of a summons in his case.

In *U. S. v. Manufacturers and Traders Trust Co.*, 703 F.2d 47 (2d Cir. 1983), the Court held that summonses can be issued by the I.R.S. under the Convention in cases involving Canadian criminal investigations, even if such a summons would not be proper in connection with a similar United States criminal investigation. The Court reasoned that I.R.S. summonses cannot be used in domestic criminal cases because such case would evade limitations under United States law on discovery in criminal cases, and usurp the function of the grand jury. The Court found these considerations of domestic law did not support similar limitations where the criminal investigation was in Canada. Under the Second Circuit's rationale, therefore, even if the Canadian authorities have invoked a procedure analogous to a Justice Department referral, the I.R.S. can nevertheless issue a summons upon request under the Convention.

In this case, however, it is not necessary to reach that issue. The only evidence in the record as to the nature and status of the Canadian investigation is that the Canadian authorities,

> " . . . made a request for information to be used to determine the correct tax liability of [petitioner], under the laws of Canada. The Canadian taxing authorities' investigation of [petitioner] is a criminal investigation, preliminary stage."

Affidavit of Thomas J. Clancy, p. 2. See also, declaration of Deborah Gavin, p. 2.

Petitioner has not established that there have been any steps taken in the Canadian criminal investigation which would be analogous to a Justice Department referral. Nor would petitioner's proposed interrogatories elicit that information. Even if this Court were to reach a conclusion different from that of the Second Circuit in *Manufacturers and Traders Trust*, petitioner would have the burden of showing that the Canadian authorities have invoked a procedure analogous to a Justice Department referral. Because he has not so shown, his contention in this respect must fail.

Canadian Law. Petitioner next contends that the summons should not be enforced because obtaining access to records in this manner would violate Canadian law relating to search warrants. This contention is without merit for at least three independent reasons.

First, the Convention contemplates that the law of the country *receiving* the request will govern in determining what information is or is not available. Canada makes the request; the I.R.S. then furnishes such relevant information as it, ". . . is entitled to obtain under the revenue laws of the United States of America . . Article XXI.

Second, even if issues of Canadian law are relevant, the courts of that country are a far preferable forum for determining whether the procedures invoked here constitute a violation of Canadian law. If petitioner persuades the courts of Canada that there were such violations in obtaining information pursuant to this summons, those courts can afford appropriate relief.

Finally, even if the issues of Canadian law were properly before this court, petitioner has not made a persuasive showing of any violation. He contends the Canadian authorities were required to obtain a search warrant for the records in question. He does not explain, however, how a Canadian judge could issue a search warrant for a bank in Bellingham, Washington. Furthermore, the United States has persuasively argued that the I.R.S. summons is at least as analogous to an "investigation," under §231(1) of the Income Tax Act of Canada, as it is to a "search," under §231(4). No search warrant is required to enter premises to examine books, records and accounts pursuant to an "investigation."

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CONCLUSION

For the foregoing reasons, petitioner's challenges to the enforceability of the summons are without merit. The court should find that:

> (1) The requirements of the Convention and of *U. S. v. Powell, supra*, have been satisfied;
>
> (2) There are no relevant factual issues, and the court should therefore decline to require the United States to respond to petitioner's interrogatories;
>
> (3) The petition to quash the summons should be denied; and

(4) The Motion for Summary Enforcement should be granted.

A proposed order accompanies this Report and Recommendation.

The court should note that there are two cases pending which are assigned to different District Judges, and which appear to be identical as to all facts and issues except the identity of the Canadian resident who is the petitioner. The cases are *Philip George Stuart v. United States*, C84-511C and *Mon Kapoor v. United States*, C84-512M. The counsel are the same in both cases, and have identified no relevant differences between the cases. The same Report and Recommendation and proposed order is being filed in each case.

DATED this 30th day of September, 1985.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate

APPENDIX H

The Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, 56 Stat. 1405-1406, provides in pertinent part:

Article XIX

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relate.

The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States.

* * * * *

Article XXI

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

2. If the Commissioner in the determination of the income tax liability of any person under

any of the revenue laws of the United States of America deems it necessary to secure the cooperation of the Minister, the Minister may, upon request, furnish the Commissioner such information bearing upon the matter as the Minister is entitled to obtain under the revenue laws of Canada.

Section 7602 of the Internal Revenue Code (26 U.S.C.) provides:

Examination of books and witnesses

(a) Authority to summon, etc.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to given such testimony,

under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragaraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No administrative summons when there is Justice Department referral

(1) Limitation of authority

No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect

For purposes of this subsection –

(A) In general

A Justice Department referral is in effect with respect to any person if –

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately

For purpose of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

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